

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

**Stella B. Werner Council Office Building  
100 Maryland Avenue  
Rockville, Maryland 20850  
(240) 777-6600**

**Case No. S-739-A**

**PETITION OF SHEMIN NURSERIES, INC.**

**OPINION OF THE BOARD  
(Hearing held February 27, 2002)  
(Effective Date of Opinion: March 28, 2002)**

Case No. S-739-A is a petition filed by Shemin Nurseries, Incorporated ("Petitioner") for a modification to an existing wholesale horticultural nursery use, pursuant to Section 59-G-2.30.0 of the Montgomery County Zoning Ordinance (being Chapter 59, Montgomery County Code, 1994, as amended) hereinafter the "Zoning Ordinance".

Decision of the Board:      Special Exception S-739-A **GRANTED**, subject to conditions enumerated below.

A hearing was held on February 27, 2002, pursuant to Section 59-A-4.11(a) of the Zoning Ordinance. Robert H. Metz and Erin E. Girard represented the Petitioner. Appearing on behalf of the Petitioner was Donald Smedberg, Vice President of Sales and Operations for Shemin Nurseries, Inc.

The Board received one letter in support of the application from the Fairland Master Plan Citizens' Advisory Committee (Exhibit No. 19).

Martin Klauber, the People's Counsel of Montgomery County, Maryland, participated in the public hearing. Mr. Klauber recommended that the Board approve the requested special exception, subject to the conditions enumerated below.

**EVIDENCE PRESENTED**

Application No. S-739-A was filed on January 18, 2002. Evidence in support of the application was presented at the hearing.

1. The Subject Property contains 8.63 acres of land located at 4100 Sandy Spring Road, Burtonsville, Maryland (Exhibit No. 1). The Subject Property is in the RC (rural cluster) zone. Currently, the only improvements on the 8.63 acre site are the original gatehouse at the southeast entrance to the property, fencing, and a retention basin (Exhibit Nos. 2, 18). Access to the property is provided by a driveway on Route 198 and the property is served by internal private driveways (Exhibit Nos. 3, 24).

2. The Subject Property is roughly pie shaped and slopes gently down towards its center (Exhibit Nos. 15, 24). The Subject Property is in the Approved and Adopted 1997 Fairland Master Plan. The Master Plan supports the existing RC zone for the property and wholesale horticultural nurseries are allowed by special exception in this zone (Exhibit Nos. 8, 18).

3. Adjoining the property to the north is land zoned RC, occupied by PEPCO power lines. Immediately to the west of the property is land zoned O-M (office building, moderate intensity) occupied by an office building (N 715) and a park and ride lot (N 552). Immediately to the east is land zoned C-1 occupied by the New Horizons Health Center (N 780), which shares the access drive off Sandy Spring Road with Shemin Nurseries, Inc. Also immediately to the east is a flag stem parcel (P 625) occupied by a house, a barn, and various agricultural buildings, from which a firewood cutting business is operated. Confronting the subject site along the south side of Sandy Spring Road is the Burtonsville Employment Overlay Zone, which has a mix of office, commercial, light industrial, and non-residential uses. Underlying zoning in the overlay zone is I-1 (light industrial) and I-3 (technology and business park). The six houses opposite the subject site on the south side of Sandy Spring Road within the overlay zone are no longer in residential use, but contain small businesses, including towing companies, plumbing companies, and electrical contractors. Also opposite the subject site within the overlay zone is the Springpointe Executive Center, containing light industrial uses (Exhibit No. 18).

4. On June 18, 1980, the Board of Appeals granted a special exception (S-739) for a wholesale horticultural nursery and greenhouse to the Petitioner (Exhibit No. 3). The Petitioner seeks to modify this existing special exception use, located at 4100 Sandy Spring Road in Burtonsville. The legal description of the property is "Parcel E Burtonsville, " recorded by plat on September 19, 1980 in Plat Book 112 as Plat No. 13123 (Exhibit Nos. 3, 18).

5. The original special exception site contained 22.2 acres of land and was improved with approximately 65,000 square feet of structures (Exhibit Nos. 3, 18). The majority of the site was an outdoor area containing potted plants, "balled" shrubs and trees, which were stored, displayed and tended there. In December 2001, the Petitioner was notified that it will be subject to the State Highway Administration's ("SHA") Quick-Take Condemnation proceedings to implement the relocation and construction of the interchange of U.S. Route 29 and Maryland Route 198. As a result, approximately 13.57 acres, upon which all of the existing structures, except for the gatehouse, have been condemned and can no longer be used for this special exception use (Exhibit Nos. 3, 18).

6. This Modification would allow the Petitioner to relocate its existing business to the eastern portion of the property (Exhibit Nos. 3, 18, 24). The modification will include the construction of a 10,000 square foot building, two stories in height, containing warehouse and office space; the construction of a small shade structure; the reconfiguration of outdoor beds and display areas; reorganization of the vehicular circulation system on site, and the relocation of 15 parking spaces to the rear of the property (Exhibit Nos. 3, 13, 18, 24, 28). The site of the new building is currently cleared beds used by the nursery. The existing gatehouse and entrance will be maintained, as will the current signage (Exhibit No. 26). The Petitioner also proposes the addition of a) a row of shade trees along the western border of the property, b) shade trees and a 4 foot evergreen hedge along the southern border to screen the building from the street, c) a 4 foot high evergreen hedge along the rear parking area (Exhibits Nos. 3, 15, 18, 24).

7. Employees currently range from 18-30 in number, depending on the season, but will not exceed the maximum number of 50 that was approved with the original grant of this special exception (Exhibit Nos. 3, 18).

8. Mr. Smedberg, testified that this modification would allow Petitioner to relocate the existing nursery after the taking by the SHA for the relocation of Route 29. Mr. Smedberg noted that Shemin has received the support of the surrounding community in their efforts to retain a presence at their current location.

9. Mr. Smedberg testified that the utilization of the property and the new building will be functionally the same as the existing uses, with the exception of the elimination of the greenhouse. Mr. Smedberg noted that while Petitioner hopes to maintain the same level of business, the removal of the greenhouse from the business may result in a reduction of business. This reduction may in turn decrease traffic to the property. Mr. Smedberg noted that at present, during peak season, traffic volume does not exceed 300 trips per day. With the modification, he expects that this traffic volume will also never exceed 300 trips per day, inclusive of deliveries.

10. Mr. Smedberg described the lighting currently existing on the property and the lighting proposed on the new building (Exhibit Nos. 13(e), 15, 24, 27). He added that the Petitioner proposes to keep the existing pole-mounted light on the gatehouse and proposes to mount a 50 watt, high pressure sodium light fixture on both the north and south sides of the proposed building over the entrance doors (Exhibit Nos. 24, 27).

11. Technical Staff of the Maryland-National Capital Park and Planning Commission ("Technical Staff") in its Report dated February 22, 2002 (Exhibit No. 18), recommended approval of the modification, subject to conditions. The Technical Staff evaluated the application for compliance with the general and specific standards required by the Zoning Ordinance for approval.

## **FINDINGS OF THE BOARD**

### **Section 59-G-1.2.1 Standard for Evaluation**

*A special exception must not be granted absent the findings required by the Article. In making these findings, the Board of Appeals...must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects that use might have is established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with the inherent effects, are a sufficient basis to deny a special exception.*

The Board finds that the inherent impacts associated with a horticultural nursery are the physical presence of buildings and parking facilities; lighting associated with the buildings; arrangement of plants and materials on the grounds of the nursery; noise, physical activity, and traffic associated with refuse collection and deliveries; and typical hours of operation. The Petitioner proposes no change in the number of employees or employee work schedule, no change in the hours of operation, no change in the existing off-site delivery schedule (i.e. business volume), no change in the estimated traffic volume to not exceed 300 trips daily, and no change, generally, in operations, with the exception of the elimination of the greenhouse. Therefore, no additional unanticipated non-inherent impacts will occur. Furthermore, given the non-residential character of the surrounding uses, no compatibility issues have or will occur.

### **General Conditions**

The General Conditions contained in Section 59-G-1.21 of the Zoning Ordinance provide that a special exception may be granted only after the Board makes specific findings.

*A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

*1. Is a permissible special exception in the zone.*

The Board finds that the use is a permitted Special Exception use in the RC Zone. The use currently exists, as it has for over 20 years, pursuant to the grant of a special exception.

*2. Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

The Board finds that the wholesale horticultural nursery use complies with the standards and requirements set forth in Section 59-G-2.30.0 of the Code.

*3. Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

The Board finds that the proposed modification is consistent with the adopted and approved Fairland Master Plan (May 1997). The Technical Staff also found the proposed modification to the Special Exception use to be consistent with the Master Plan. The existence of the use is noted on pages 67-68 of the Plan and the Plan supports the existing RC zone for the Property, in which a wholesale horticultural nursery is allowed pursuant to a special exception.

*4. Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

The use has existed on a 22.2 acre site for over 20 years, and will be relocated to a 8.63 acre portion of the site to the east due to the taking of the western portion of the property for public use. There have been no complaints about the existing nursery, and since there will be no changes in operations, no adverse effects are anticipated. The Board finds that the proposed modification to the special exception use to construct a 10,000 square foot new building will not create an intensity of use or activities on the Subject Property that will alter the character of the neighborhood. The Petitioner's use of the proposed new building and property will be identical to the existing special exception use. The scale of the new building is less than that of the existing building. Additionally, the building will be screened from view of adjacent properties by the existing and proposed landscaping.

*5. Will not be detrimental to the use, peaceful enjoyment, economic value, or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The Board finds that this modification will not be detrimental to the use, peaceful enjoyment, economic value or development of the surrounding properties or general neighborhood because the use is in harmony with the general character of the neighborhood,

sufficient screening is maintained and provided and Petitioner's existing operations are not in conflict with enjoyment of the surrounding properties.

6. *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The Board finds that the modification to the special exception use will not cause any objectionable noise, vibrations, fumes, odors, dust or physical activity at the Subject Property. The Lighting Plans demonstrate that the lighting levels on the new building and gatehouse will be shielded and at levels necessary for safety and security that will not create glare onto adjacent properties.

7. *Will not, when evaluated with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

The Board finds that the subject site is zoned RC (rural cluster) and is located in a neighborhood of mixed, non-residential zoning, and therefore this section is not applicable. Furthermore, the application is for a modification that will not be adding intensity. Therefore, the use will not, when evaluated in conjunction with other existing and approved special exceptions in the neighborhood, increase the intensity or scope sufficiently to adversely affect the area.

8. *Will not adversely affect the health, safety, security, morals, or general welfare of residents, visitors, or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The Board finds that the modification will not adversely affect the health, safety, security, morals or general welfare of the residents, visitors, and workers in the area of the Subject Property.

9. *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities.*

The Board finds that the Subject Property will continue to be adequately served by public facilities. The Technical Staff concluded that the site-generated traffic would not be increased during morning peak and evening peak periods and may possibly decrease without the greenhouse operation. Therefore, a traffic study to analyze the congestion levels at nearby intersections was not required to satisfy Local Area Transportation Review. Furthermore, the site is located in the Patuxent Policy Area, which has established no transportation staging ceilings for non-residential development under the *FY 2002 Annual Growth Policy*.

*(i) If the special exception requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception.*

The Board finds that the adequacy of the public facilities for the nursery was determined at the time of subdivision review for the original special exception. Re-recording of the property is not required when boundaries change due to a taking for

public use, but the applicant may request re-recording at its discretion, pursuant to Section 50-38 of the Montgomery County Subdivision Regulations and the Staff has indicated that they will support such a request.

*(ii) With regard to the findings relating to public roads, the Board, the Hearing Examiner or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

The Board finds that there will be no detrimental effect on the safety of vehicular or pedestrian traffic, but because the median is planned to be closed, as a condition of approval, the special exception applicant must coordinate with SHA.

### **Section 59-G-2.30.0- Specific Conditions for a Wholesale Horticultural Nursery**

*This use may be allowed together with incidental buildings upon a finding by the Board of Appeals that the use will not constitute a nuisance because of traffic, noise, hours of operation, number of employees, or other factors. It is not uncommon for this use to be proposed in combination with a retail horticultural nursery, a landscape contractor, or a mulch/compost manufacturing operation. If a combination of these uses is proposed, the Board's opinion must specify which combination of uses is approved for the specified location.*

The Board finds that the use as modified will not constitute a nuisance because of traffic, noise, hours of operation, number of employees, or other factors. The nursery has been in existence since 1980, and is simply consolidating its operations onto an 8.63 acre tract on the eastern portion of its property. The western portion is being taken for public use through SHA's Quick-Take Condemnation proceedings. Operations will remain the same as they were prior to the condemnation proceedings.

(1) *Plants, trees, shrubs, seeds, and bulbs may be grown or produced and sold on a wholesale basis.*

The Petitioner will continue to sell its horticultural products on a wholesale basis.

(2) *Fertilizers, plant foods, and pesticides must not be produced but may be stocked and sold on a wholesale basis.*

The Petitioner will not produce these items but will sell them on a wholesale basis.

(3) *The following activities are not allowed unless the Board has also approved a retail nursery or garden center under Section 50-G-2.30(1):*

(i) *The sale or storage of any equipment other than equipment needed in the operation of the nursery or greenhouse.*

The equipment that the Petitioner stores will not be for sale and will only be for use in the operation of the nursery.

(ii) *The retail sale of plant materials or garden supplies or equipment.*

The Petitioner will operate solely on a wholesale basis.

(4) *The minimum area of the lot is 2 acres.*

The Petitioner's site area is 8.63 acres and thus complies.

(5) *The minimum building setback from any property line is 50 feet.*

All buildings are set back from the property line more than 50 feet.

(6) *Parking must be provided on site in accordance with the requirements for an industrial or manufacturing establishment or warehouse in Article 59-E.*

The Petitioner is providing 15 spaces, in compliance with relevant parking requirements.

(7) *Adequate screening and buffering must be provided for all parking areas and other on-site operations having a potentially adverse impact on adjoining residential or agricultural uses.*

The Petitioner has provided adequate screening and buffering.

(8) *In evaluating the compatibility of this special exception with surrounding land uses, the Board must consider that the impact of an agricultural special exception on surrounding land uses in the agricultural zones does not necessarily need to be controlled as stringently as the impact of a special exception in the residential zones.*

The Board has noted this provision and agrees with Staff's conclusions.

Therefore, based on the foregoing, the Board GRANTS the Special Exception in Case NO. S-739-A, subject to the following conditions:

1. The Petitioner shall be bound by all of its testimony and exhibits of record and the testimony of its witnesses and representations of its attorneys to the extent that such testimony and evidence are identified in the Board's opinion granting the special exception.
2. Hours of operation are restricted to: a) from mid-March through Christmas, 7:00 a.m. and 5:00 p.m. Monday through Friday and 7:00 a.m. to 12:00 p.m. on Saturday, and B) from Christmas through mid-March, 8:00 a.m. through 4:30 p.m. Monday through Friday, with no weekend hours.
3. Maximum number of employees is restricted to 50.
4. The Petitioner must coordinate with State Highway Administration regarding the existing site access and State Highway Administration's Consolidated Transportation Program Project No. 152046, US 29 Columbia Pike Interchange with MD 198.
5. The Petitioner must submit for review for compliance with the Patuxent River Primary Management Area guidelines, stormwater management concept and sediment/erosion control plans by the Environmental Planning Division of the M-NCPPC prior to approval and issuance of permits by the Montgomery County Department of Permitting Services. The Petitioner will notify the Board upon completion of the Technical Staff's review.
6. No parking shall be allowed around the perimeter of the proposed building. Customers will be allowed only to check-in at the building. This restriction on parking shall be enforced by signage and Petitioner's Personnel.
7. The existing platform on the west side of the subject site currently used for overseeing display areas shown on Exhibit 24 shall be removed.
8. Perimeter fencing for the subject site will not be required until the State Highway Administration has completed its construction of the realigned Route 29 along the west side of the subject property.



On a motion by Donna L. Barron, seconded by Louise L. Mayer, with Angelo M. Caputo, Allison Ishihara Fultz and Donald H. Spence, Jr., Chairman, in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland, that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

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Donald H. Spence, Jr.  
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 28<sup>th</sup> day of March, 2002.

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Katherine Freeman  
Executive Secretary to the Board

Note:

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedures.

Any request for rehearing or reconsideration must be filed within fifteen (15) days of after the date the Opinion is mailed and entered into the Opinion Book (see Section 59-A-4.63 of the County Code). Please see the Board's rules of Procedure for specific instructions requesting reconsideration.

See Section 59-A-4.53 of the Zoning Ordinance regarding the 24 months' period within which the special exception granted by the Board must be exercised.

See Section 59-A-3.2 of the Zoning Ordinance regarding Use and Occupancy Permit for a Special Exception.